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IN THE

Supreme Court of the United States

NXIVM CORPORATION, *et al.*,

Petitioners,

v.

THE ROSS INSTITUTE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT STEPHANIE FRANCO

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INTRODUCTION

In holding that plaintiffs NXIVM Corporation and First Principles, Inc. ("Petitioners") could not establish a likelihood of success on the merits of their copyright infringement claims, the United States Court of Appeals for the Second Circuit applied the fair use doctrine in accordance with the Copyright Act and this Court's prior formulations of that defense. The Second Circuit held that good faith is one factor to consider when analyzing the nature and character of the use — the first prong of the non-exclusive fair use criteria set forth in Section 107 of the Copyright Act. It further held that good faith or lack thereof was not dispositive of fair use. These rulings comport with the holding of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583-84 (1994) that no single element is dispositive on a fair use analysis. The Second Circuit's ruling also follows this Court's statements in *Harper and Row Publishers, Inc. v. Nation Enterprise*, 471 U.S. 539, 562 (1985) regarding the relevance of good faith to fair use analysis.

Petitioners' assertion that review is necessary because there exists some ambiguity in this Court's statements about the role of good faith is unfounded. No such ambiguity exists. Even if such ambiguity existed, this Court's review is unnecessary. Whether good faith is one factor to consider as *Harper and Row* holds, or irrelevant, as Petitioners suggest *Campbell* implies, is not relevant to the outcome of this appeal. The Second Circuit applied *Harper and Row* — the more stringent standard — yet still concluded that defendants made a fair use of the copyrighted materials.

Petitioners try to manufacture a conflict among the circuit courts where none exists. The Second Circuit's ruling in this

case is entirely consistent with the case law from the Ninth Circuit that holds that a party's bad faith is one issue that a court must consider when evaluating the nature and character of the use. It also comports with the Federal Circuit's holding in *Atari Games Corp. v. Nintendo of Am., Inc.* 975 F.2d 832 (Fed. Cir. 1992). Relying on law from the Ninth Circuit, the Federal Circuit ruled that defendants' non-transformative bad faith use of plaintiffs' computer program was not fair use. Two years later, this Court held in *Campbell* that no single factor was dispositive. Thereafter, the Ninth Circuit announced, in reliance on *Campbell*, that bad faith was not dispositive to a fair use analysis. Thus, it does not appear that today the Federal Circuit would rule that bad faith was a per se bar to invocation of the fair use defense, particularly where, as here, a transformative use was involved. Copyright cases considering fair use are fact sensitive merely because judicial opinion differs in their description of "fair use" does not mean that these differences must be reviewed by this Court.

STATEMENT OF THE CASE

Petitioners did not appeal to the Second Circuit from any of the District Court's rulings concerning defendant/ appellee Stephanie Franco ("Ms. Franco"), including, the District Court's denial in part of Petitioners' request for injunctive relief against Ms. Franco. Petitioners' brief, however, includes misstatements regarding Ms. Franco to which a response is required pursuant to Rule 15.2.

First, the record does not support Petitioners' contention that Ms. Franco signed two confidentiality agreements before attending NXIVM's classes. (Petition for Writ of Certiorari ("Pet.") at 4.) Ms. Franco signed an application to attend

NXIVM's classes that contained what the District Court stated was "boilerplate wording." (A-715.) The District Court referred to that application as an alleged contract (A-715) and merely assumed for the purposes of the request for injunctive relief, without deciding the issue, that the boilerplate confidentiality language was a contract. (A-715.) There is no evidence that Ms. Franco signed a second form that was identified as a confidentiality agreement. Ms. Franco certified that she did not sign such a document. (A-94, A-858.)

There is also no evidence that Ms. Franco gave *Petitioners'* purportedly confidential materials to respondent Richard Ross (together with all defendants other than Ms. Franco (the "Ross Defendants"). Contrary to Petitioners' assertion (Pet. at 4 n.2), Ms. Franco and Mr. Ross both provided affidavits that stated that Ms. Franco gave her materials to her brother — not to Mr. Ross. (A-96, A-633.)

Finally, Petitioners' statement that the District Court enjoined Ms. Franco from transmitting the materials "in reliance on the confidentiality clause" is inaccurate. The District Court did not find that Ms. Franco had violated a "boilerplate" confidentiality provision. It enjoined Ms. Franco from disseminating the materials to anyone other than her attorneys and her agents. The Court issued the injunction to preserve the status quo (A-715) and only after Ms. Franco had represented to the Court that she did not want Petitioners' materials and that she had given the ESP course materials to her attorney without retaining a copy. (A-93, A-363.)

REASONS FOR DENYING THE PETITION

The decision below does not conflict with this Court's precedent concerning the fair use doctrine and does not reveal a split between the Second Circuit and any other circuit. *Harper and Row*, *supra*, concerned the publication by The Nation magazine of verbatim quotes from President Ford's memoirs. The magazine asserted that the fair use doctrine was a defense to the claims by Time Magazine.[1] This Court considered several factors in its review of the purpose and character of the works. The Court balanced the commercial nature of the Nation's activities against the Nation's fair use assertion. It ruled that *Nation's* intention to use the copyrighted work to "scoop" Time weighed against fair use. *Id.* at 562 ("The Nation's use had not merely the incidental effect but the intended purpose of supplanting the copyright holder's commercially valuable right of first publication.") Finally, the Court weighed the district court's finding that the Nation "knowingly exploited a purloined manuscript." *Id.* at 563. This Court's treatment of the matter demonstrates that a defendant's bad faith is only one factor that goes into an evaluation of the nature and character of the use and is not dispositive of even that factor much less the availability of the fair use defense.

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1. Section 107 of the Copyright Act identifies the following four non-exclusive factors to consider when evaluating the fair use defense: (1) the purpose and character of the use including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107.

The analysis of the fair use doctrine in *Campbell* confirms that no single factor is dispositive of fair use. The Court stated

> the task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. . . . Nor may the four statutory factors be treated in isolation, one from the other. All are to be explored, and the results weighed together in light of the purposes of the copyright.

Campbell, 510 U.S. at 578 (1994). The Court found that the Circuit Court had erred by giving virtually dispositive weight to the commercial nature of the song parody at issue. *Id.* at 583-84. The Court identified the commercial nature of the allegedly infringing work as only one element of the inquiry into the first factor. This Court also suggested in footnote 18 that good faith was not central to fair use. *Id.* at 585 n.18. ("Even if good faith were central to fair use . . .") That statement was consistent with the Court's application of fair use in *Harper and Row* where the Nation's good faith was only one of the matters that the Court considered when it looked at the nature and character of the use.

The Second Circuit applied the fair use test in accordance with both the holdings of *Harper and Row* and *Campbell*. As required by *Campbell*, the Court did not give dispositive weight to any single factor. (Pet. 10a-11a.) The Court considered defendants' purported bad faith the same way that this Court did in *Harper and Row* — as part of an overall evaluation of the nature and character of the allegedly infringing use. (Pet. 9a-11a.) The Second Circuit assumed the Ross defendants' bad faith and weighed that against them.

Consistent with *Campbell*, however, the Court found that the transformative nature of the use demonstrated that even considering defendants' purported bad faith, the nature and character of the use still favored defendants. The Second Circuit did note that some language in *Campbell* and some scholarly commentary suggested that bad faith should play no role in a Court's analysis, but specifically refused to adopt such a rule. (Pet. 10a n.2.) Thus, the Court applied the more stringent rule announced in *Harper and Row*, but still ruled in favor of the Ross Defendants.

Petitioners' further assertion that there exists a variety of rules in the Second, Ninth and Federal Circuits is unfounded. The approaches taken by the Second and Ninth Circuits are consistent. The Second Circuit in the instant case and in its prior rulings holds that bad faith is an integral element of the nature and character inquiry. (Pet. 11a.) *Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d Cir. 1991). The Ninth Circuit takes the same approach. *See Los Angeles News Service v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997), *cert. denied*, 522 U.S. 823 (1997). In *Los Angeles News Service*, the Ninth Circuit found defendants' purported bad faith to be relevant but not dispositive. *Los Angeles News Service*, 108 F.3d at 1122. A district court in the Ninth Circuit applied the same test in a case that bears similarity to the instant matter, *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995). There, an organization affiliated with the Church of Scientology brought a copyright infringement suit based on the posting of allegedly confidential materials on the Internet. The District Court held that the allegation that the copyrighted materials had been obtained in an

unauthorized manner was only one factor that weighed against fair use, but was not dispositive. *Id.* at 1244-45.[2]

On careful analysis, the Second Circuit and Federal Circuit substantially agree with respect to the fair use doctrine. The Federal Circuit applies the law of the regional circuit from which the case arose in deciding substantive copyright issues, including fair use. *See* The *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1191 (Fed. Cir. 2004); *Atari Games Corp.*, 975 F.2d at 837. ("To resolve issue of copyright law, this Court applies the law as interpreted by the regional circuits in this case, the United States Court of Appeals for the Ninth Circuit.") In *Atari Games*, the Federal Circuit's ruling that defendants' bad faith barred an assertion of fair use relied on Ninth Circuit law as it existed in 1992. The Ninth Circuit's subsequent holding in *Los Angeles News Service* was that bad faith was only one sub-factor in the fair use analysis. Here, *Atari Games* is no longer a correct interpretation of Ninth Circuit law. The Federal Circuit would not reach the same conclusion regarding the role of bad faith in the fair use analysis, if faced again with an appeal from a court in the Ninth Circuit. Significantly, this Court's subsequent holding in *Campbell* that no single factor is determinative of a bad faith demonstrates that *Atari Games* is no longer binding.

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2. The Court in *Religious Technology Limited* ultimately found the use of plaintiffs' material had not been fair based in large part on the non-transformative nature of the use. Here, the Second Circuit properly found the Ross defendants' use transformative.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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